

May 10, 2007

Mr. Robert P. Reeder  
1302 Barksdale Road  
Newark, DE 19711

**RE: Freedom of Information Act Complaint  
Against Delaware State University**

Dear Mr. Reeder:

On April 3, 2007, our Office received your complaint alleging that the Board of Trustees of Delaware State University ("the Board of Trustees") violated the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA"), by not providing you with a copy of the agenda and minutes for a "retreat" held in Phoenix, Arizona in March 2007.

By letter dated April 3, 2007, our Office asked the Board of Trustees to respond to your FOIA complaint in writing by April 13, 2006. Our Office received the Board's response on April 13, 2007.

According to the Board of Trustees, all of the members of the Board were invited to attend a conference March 3-6, 2007 in Phoenix, Arizona sponsored by the National Conference on Trusteeship. According to the Board, thirteen members of the seventeen-member Board (a quorum) attended the conference.

The Board provided our Office with a copy of the Schedule for the conference. The first day (March 3, 2007) was a series of preconference workshops (*e.g.*, Strategic Board Development; Strategic Finance for Presidents and Trustees; Endowment, Asset and Debt Management).

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Preconference workshops continued most of the second day, March 4, 2006 (*e.g.*, Board's Responsibility for Presidential Search; Ensuring Academic Program Quality; Raising the Bar in Fund Raising) followed by an Opening Reception.

On the third day (March 5, 2007) the conference addressed a variety of policy issues, first in a roundtable and then in concurrent sessions (*e.g.*, President and Board Responsibilities in the Global Century; the Board's Role in Accreditation; Building a Faculty-Board Relationship; Tuition Discounting). On the last day (March 6, 2007), the conference continued to address a variety of policy issues (*e.g.*, Student Paths to Degree Completion; Intercollegiate Athletics; and the Challenge of Affordability).

According to the Board of Trustees:

Not to be unexpected, the attending Board members on occasion sat together in conference sessions and occasionally ate meals together. These occasional groupings of Board members in the course of the conference did not constitute a meeting within the scope or meaning of FOIA. University business was not discussed during these groupings of Board members.

All of the Board members were invited to eat meals together. These meals were purely social in nature and University business was not discussed. Given the social nature of the meals, spouses and significant others were included.

The Board contends that "attendance at this conference does not constitute a meeting of the Board subject to the disclosure requirements of FOIA."

#### **RELEVANT STATUTES**

FOIA requires that "[a]ll public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body." 29 *Del. C.* §10003(a).

FOIA requires public bodies to "give notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda, . . . ." *Id.* §10004(e)(2). FOIA requires a public body to "maintain minutes of all meetings, including executive sessions, . . . and shall make such minutes available for inspection and copying as a public record." *Id.* §10004(f).

FOIA defines a "meeting" as "the formal and informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business." *Id.* §10002(b). FOIA defines "public business" as "any matter over which the public body has supervision, control, jurisdiction or advisory power." *Id.* §10002(e).

### **LEGAL ANALYSIS**

You made a FOIA request for the agenda and minutes of the Board's alleged meeting in Phoenix, Arizona. The Board contends that FOIA did not require it to post an agenda and prepare minutes because the conference was not a "meeting" as defined by FOIA. The Board contends that if it did not meet to discuss "public business," as defined by FOIA, at the conference, then the Board did not have an obligation under FOIA to notice the conference to the public and prepare minutes.

FOIA defines a "meeting" as "the formal and informal gathering of a quorum of the members

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of any public body for the purpose of discussing or taking action on public business." *Id.* §10002(b). Our Office has not had previous occasion to determine whether attendance by a quorum of the members of a public body at a national conference was a "meeting" for purposes of FOIA.

In *Att'y Gen. Op.* 04-IB18 (Oct. 18, 2004), the Cape Henlopen School Board attended a two-day retreat at the Great Oaks Resort in Chestertown, Maryland. A quorum of the Board went to a social gathering and dinner the first day. The Board acknowledged that the next day "a quorum of the Board discussed matters of public business regarding the Cape Henlopen School District with School District administrative staff members in violation of FOIA." Since the Board acknowledged it violated the open meeting law by not noticing the meeting to the public and preparing minutes, the only issue was what remediation, if any, our Office should require. *See also Att'y Gen. Op.* 98-IB04 (May 20, 1998) (school board did not give adequate notice to the public of a "retreat workshop" where the board discussed "creative thinking and planning for the school district").

A retreat is usually intended to bring members of a public body together in a more relaxed, social environment to focus on policy issues and not to take action on specific matters of public business. The purpose of the open meeting law, however, is to open to the public the entire deliberative process of public bodies. When a retreat is used by a public body to discuss issues within the body's policy-making authority, the public may have a right to attend and receive the same advance notice, including an agenda, which is required for more traditional meetings. *See Levy v. Board of Education of Cape Henlopen School District*, C.A. No. 1447, 1990 WL 154147, at p.6 (Del. Ch., Oct. 1, 1990) (Chandler, V.C.) (under FOIA, a "meeting" includes "fact gathering,

deliberations and discussions all of which surely influence the public entity's final decision").

A national educational or training conference – attended by representatives of public bodies from around the country – serves a different purpose. Such conferences are designed to provide training or background information about common issues rather than to address and take action on matters of public business pending or likely to come before any one public body.

We do not believe that the legislature intended FOIA to apply when members of a public body attend a national, regional, or state conference or convention to hear speakers on subjects of general interest. If the purpose of the conference is for general education and social interaction, then we do not believe that attendance at such a conference by a quorum of a public body amounts to meeting for purposes of FOIA.

The open meeting law should not be construed to deter public officials from attending conferences and training sessions to improve their management and leadership skills and to learn from their counterparts in other states. That is not part of the policy-making process which FOIA entitles citizens to monitor and observe. If a conference concerns a topics of general interest, even one that might affect how a public body might view a future policy issue, the educational session itself would not involve the conduct of public business because the session would be too remote from any actual decision making.

There is no evidence in the record to show or even suggest that a quorum of the members of the Board of Trustees used the conference sponsored by the National Conference on Trusteeship in Phoenix, Arizona on March 2-6, 2007 as an opportunity to discuss any specific matters of public

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business pertaining to Delaware State University which were actually or potentially under consideration by the Board.

In other contexts, our Office has determined that a person alleging a meeting of a public body took place "must make at least a *prima facie* showing that a meeting occurred." *Att'y Gen. Op.* 05-IB10 (Apr. 11, 2005). "It would be unfair to require [a public body] to prove a negative." *Id.* "Once a [person] has made a *prima facie* case that a quorum of a public body has met in private for the purpose of deciding on or deliberating toward a decision on any matter [of public business], the burden then shifts to the [public body] to prove that no violation of the open meetings law occurred." *Id.*

Our Office determines that you have not made a *prima facie* showing that a quorum of the Board of Trustees held a meeting at the national conference in Phoenix to discuss any matters of public business specifically pertaining to Delaware State University which were actually or potentially under consideration by the Board.

### **CONCLUSION**

For the foregoing reasons, our Office determines that the Board of Trustees did not violate the public record requirements of FOIA. The Board did not hold a "meeting," as defined by FOIA, at the national conference in Phoenix, to discuss any matter of public business specific to Delaware State University. Since there was no "meeting" for purposes of FOIA, the Board was not required

to notice the conference to the public or prepare minutes. The Board did not violate the public record requirements of FOIA by denying you access to the agenda and minutes because FOIA did not require the Board to post an agenda or prepare minutes.

Very truly yours,

W. Michael Tupman, Esquire  
Deputy Attorney General

APPROVED

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Lawrence W. Lewis, Esquire  
State Solicitor

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cc: The Honorable Joseph R. Biden, III  
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